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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,)	
Plaintiff,)	
vs.)	Case No. 17335
MAX D. GILES,)	
Defendant.)	

BRIEF OF APPELLANT

APPEAL FROM THE DECISION OF THE THIRD JUDICIAL DISTRICT
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IN THE SUPREME COURT OF THE
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vs.)	Case No. 17335
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Defendant.)	

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This appeal is from the decision of the Third Judicial District Court denying the defendant's appeal from a criminal conviction in the First Circuit Court, Coalville Department.

DISPOSITION IN LOWER COURT

The defendant-appellant was found guilty in the First Circuit Court, Coalville Department, by Judge Keller, of wreckless operation of a motor boat. An appeal was taken from the judgment to the District Court and Judge David B. Dee confirmed the lower court's finding.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have this Court reverse the decision of the Circuit Court and the District Court and dismiss the criminal charge which was filed against the appellant.

STATEMENT OF FACTS

On July 29, 1979, the defendant, Max Giles, was issued a citation by the State of Utah selected State of Utah vs. Max D. Giles. That citation charged Mr. Giles with exceeding a slow wakeless speed in violation of section 73-18-17(3). Mr. Giles was ordered to report to the Court by August 14, 1979. (Record, p. 1)

On July 31, 1979, the Fifth Judicial District Circuit Court mailed a letter to Mr. Max D. Giles in which Mr. Giles was told that he had three alternatives available to him to resolve the citation. The first paragraph indicated that he could post bail in the sum of \$25.00 and that that bail would be forfeited and the case would be closed. (R., p.2) Mr. Giles selected the alternative set forth in paragraph one and on August 12, 1979, forwarded his personal check to the Summit County Clerk's Office for the sum of \$25.00. That check was receipted by the Fifth Circuit Court and a copy of Receipt No. 0318 was forwarded to Mr. Giles indicating that on August 15, 1979, the court received the \$25.00 check. The receipt indicated that the money was bail and fine. (R., p.3) On September 30, 1979, the Fifth Circuit Court Clerk forwarded the \$25.00 received from the defendant to the Division of Parks and Recreation along with other monies that

hail been accepted by the Court either as fines or forfeiture. (Def. Ex. #1)

On the 31st day of October, 1979, the Summit County Attorney's Office caused a Complaint and Summons to be issued against Max D. Giles for wreckless operation of a motor vehicle in violation of section 73-18-12(1) at Echo Reservoir on July 29, 1979. (R., P.4) This charge was for the same factual situation on which the citation was issued. The County Attorney conceded on the Court record that the citation and the Complaint were for the same incident. (Transcript, p.12) The Court record will reflect that at no time did the County Attorney's office make a motion to amend the citation to allege wreckless operation of a boat.

The charge of wreckless operation of a motor boat was set for trial before the Honorable Larry Keller for the 13th day of February, 1980 at 9:30 A.M. At the time of the trial setting, the defendant, by and through his attorney, made a motion before the Court asking that the Complaint charging wreckless operation of a motor boat be dismissed because of the single criminal episode statute contained in section 76-1-401 through 403, Utah Code Annotated. (T., p. 4-7) This motion was denied by Judge Keller on the basis that the bail on the exceeding a wakeless speed had not been forfeited. (T., p. 8&9) Judge Keller indicated that he had not personally approved the forfeiture and consequently, there was no forfeiture of bail on that citation. On the 19th day of April, 1979, Judge Floyd H. Gowans, the presiding Judge

of the Fifth Circuit Court, issued an administrative order which established a bail schedule which was to become effective on May 7, 1979. (R., p.64-69) That bail schedule established bail for operating a motor boat in excess of a slow wakeless speed at \$25.00.

After the Court denied the defendant's motion for dismissal based on the single criminal episode, the defendant made a motion before the Court that the charge of exceeding a slow wakeless speed either be dismissed or tried before the wreckless operation of a motor boat charge. (T., p.9 & 12) Judge Keller denied this motion on the basis that there was no charge before his Court charging that the defendant had exceeded a slow wakeless speed. (T., p.10 & 13) The defendant then moved the Court to return to the defendant his \$25.00, but the Court denied this motion on the basis that the \$25.00, which was then in the hands of the Park and Recreation Department, was in fact bail for the wreckless operation of a motor boat charge. (T., p.17 & 18)

Prior to the actual trial of the case, the defendant moved the Court for a dismissal of the action on the basis that the statute under which the defendant was charged with wreckless operation of a motor boat was unconstitutionally vague. The statute in question provided that a person was guilty of wreckless operation of a motor boat if he operated the motor boat in a wreckless or negligent manner. This motion was denied by the Judge. (T., p.18-21)

The testimony presented at the trial indicated that the defendant was operating his motor boat outside of the buoys which marked the wakeless speed area surrounding the dock. (T., p.86, L.10-16, p.63, L.10) The defendant's boat was travelling at approximately three-quarter throttle and the defendant was paralleling the docking area outside of the buoys while he was observing the docks to see if the trailer was in position so that he could remove his boat from the water. (T., p.86, L.17 through p.89, L.15) The defendant and one of his passengers both testified that they observed a boat ahead of them and to the right motionless in the water and an individual attempting to put on water skis. The defendant then directed his attention back to the dock and his trailer. After looking in that direction he again looked forward and was momentarily blinded by the sun reflecting off his windshield. (T., p.94, L.3 through p.95, L.23) As soon as he could focus his eyes, he became aware of the fact that the boat that had been sitting still in the water had accelerated at a rapid speed and pulled into his path. (T., p.20, L.3-10, p.61, L.9 through p.64, L.20; p.86, L.25 through p.87, L.12) About the time the defendant became aware of this, his passenger also noticed the boat and yelled for the defendant to change his course. (T., p.55, L. 5 through p.57, L.16; p.61, L.6 through p.62, L.14) The defendant then immediately turned his boat to the

right as sharp as possible missing the motor boat which had pulled in front of him and hit the skis of the water skier throwing him into the water. The prosecution did not have present either the operator of the other boat or the passenger of the other boat. The only witnesses available for the prosecution were the passenger of the defendant's boat, the water skier and one of the water skier's relatives who had been standing on the shore approximately 150 yards away. The water skier testified that he had not seen the defendant's boat until the time of the impact. (T., p.67, L.13-18) The state witnesses acknowledged that the boat that had been stopped and the boat which was towing the water skier took off at full speed and travelled into the path of the defendant's boat. (T., p.30, L.3-10; p.61, L.9 through p.64, L.20; p.86, L.25 through p.87, L.12)

Judge David B. Dee, when reviewing this matter on appeal, issued a Memorandum Decision in which he did not comment on any of the facts or issues of law presented on appeal except to state that

. . .the State is not prohibited from prosecuting the defendant because of the single criminal episode statute and that the statute under which this defendant was tried is not unconstitutionally vague nor was the evidence insufficient to find the defendant guilty beyond a reasonable doubt of violating the statute in question.

A R G U M E N T

POINT I

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS OF
DUE PROCESS OF LAW.

It is the contention of the defendant, under Section 76-1-401, Utah Code Annotated, 1953, as amended, that the state is prohibited from subsequent prosecutions if a person has been penalized for an offense arising out of the same criminal episode. Section 76-1-401, Utah Code Annotated, 1953, as amended, defines a single criminal episode as all conduct which is closely related in time and in incident to an attempt or an accomplishment of a single criminal object. At the time of the trial before the circuit court, Judge Keller stated on record that there was no question but that exceeding a wakeless speed and the wreckless operation of a motor boat were in fact results of a single criminal episode. (T., p.6, L.14-23) The county attorney did not content otherwise. Judge Keller, however, stated that he had not personally approved the forfeiture and therefore, no jeopardy had attached and consequently, the prosecution for the wreckless operation of a motor boat was not prohibited. (T., p.24 through p.25, L.17)

As indicated in the Statement of Facts, the defendant was sent a letter by the circuit court stating that he could forfeit bail on the citation of exceeding a wakeless speed and that the case would be closed. In addition, the circuit court had established a bail schedule by court order. Pursuant thereto the clerk of the court accepted the bail forwarded by

the defendant providing the defendant with a receipt from the Fifth Circuit Court indicating that the bail had been forfeited as a fine. The money was then transmitted to the Parks and Recreation Department and that department took the money and presently has it in its coffer. Approximately one month thereafter the county attorney's office issued a new complaint charging wreckless operation of a motor boat at the same time, place and based upon the same circumstances.

It is the position of the defendant that the State of Utah is absolutely barred from instigating a separate complaint in light of the fact that it accepted a bail forfeiture on a criminal citation which involved a single criminal episode. It is also the position of the defendant that the judge having established a bail schedule and having authorized the clerk to forward a letter to defendants coming before the court authorizing them to forfeit bail cannot at a later date claim that the bail forfeiture has no consequences because he personally did not approve it. It was an established practice of this circuit court as well as all other circuit courts to allow bail forfeitures without personal approval of the individual judges. It should be noted that the Parks and Recreation Department still has the defendant's forfeited bail and to this date has not returned it to him.

After Judge Keller refused to dismiss the wreckless operation charge as requested by the defendant, the defendant moved the court to either dismiss the exceeding a wakeless speed charge or to try it prior to the wreckless operation of

a motor boat charge. Judge Keller refused to do so indicating that there was no such charge pending before the court. Section 77-11-9 indicates that a citation which is filed with the magistrate may be used in lieu of a complaint to which a person may plead guilty or on which bail may be posted and forfeited. The court has ruled that the bail has not been forfeited on that citation and has refused to either dismiss the citation or proceed with a trial on it. The court obviously made this ruling because it realized that if the defendant was found guilty on the citation or if the citation was dismissed, the court would be prohibited from proceeding on the wreckless operation of a motor vehicle charge. For some reason Judge Keller had determined that the defendant would be tried on the latter charge regardless of what the law or rules of procedure had to say about the matter.

The evidence produced at the time of the trial demonstrated that the defendant was operating his motor boat outside of the wakeless area on Echo Reservoir. He was proceeding in a direct line of traffic at a constant rate of speed. A boat which was towing a water skier was sitting in the water to the defendant's right. While the defendant was in full view, the other boat started up and pulled directly into the path of the defendant's vehicle causing a collision between the defendant's boat and the water skier being pulled by the other boat. Based upon this

information Judge Keller found that the defendant was guilty of wreckless operation of a motor boat and sentenced him to thirty days in jail.

It is the position of the defendant that Judge Keller's actions and Judge Dee's confirmation of those actions by denying the defendant's appeal constitute a violation of the defendant's right of due process of law as provided by both the state and federal constitutions.

POINT II

THE STATUTE CHARGING THE DEFENDANT WITH WRECKLESS OPERATION OF A MOTOR BOAT IN UNCONSTITUTIONALLY VAGUE.

Title 73, Chapter 18, Section 12-1, of the Utah Code Annotated, states that a person is guilty of the wreckless operation of a motor boat if he operates the motor boat in a wreckless or negligent manner so as to endanger the life, limb or property of another. This statute incorporates two separate definitions. One is the wreckless operation of a motor boat and the other is the negligent operation. The state code does not give any definition for wreckless or negligent operation of a boat. Consequently, it of necessity incorporates the definitions of civil law negligence. There is a substantial difference between wreckless operation and negligent operation. The negligent operation of a boat could include such things as failing to keep a proper lookout, failing to yield right-of-way and other violations which under criminal law constitute lesser offenses which do not

that the statute in question is unconstitutionally vague and that consequently, the defendant cannot be prosecuted under it or convicted under it.

CONCLUSION

The Judge committed prejudicial error and denied the defendant his due process of law when he failed to dismiss the wreckless operation of a motor vehicle charge. The Court accepted and forfeited the defendant's bail on the citation charging him with exceeding a wakeless speed and the wreckless operation of a motor boat charge grew out of a single criminal episode, and was, therefore, barred by Section 76-1-403, Utah Code Annotated.

The statute under which the defendant was prosecuted, wreckless operation of a motor boat, was unconstitutionally vague in that it permitted the Judge to find the defendant guilty of wreckless operation on the basis of failing to yield right-of-way and failing to keep a proper look-out, both of which are, in fact, criminal violations of lesser severity.

WHEREFORE, the defendant requests that the Court reverse the decision of the lower court finding the defendant not guilty as charged.

DATED this ____ day of December, 1980.

ROBERT A. ECHARD
Attorney for Appellant-
Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct
copy of the foregoing Brief of Appellant to the Summit
County Attorney's Office, Summit County Courthouse, Coalville
Utah 84107, on this the ____ day of December, 1980.

JEANNINE C. DAMEWORTH